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In the Supreme Court of the United States

at

OCTOBER TERM, 1964.

Docket No. 249

SCOTT N. BROWN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee.

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TABLE OF CONTENTS.

Citations to Opinions Below 2

Jurisdiction of This Court 2

Questions Presented 3

Constitutional Provisions Involved 5

Tennessee Code Sections Involved 5

Statement of the Case 6

Reasons for Granting Writ of Certiorari 14

Conclusion 15

Certificate of Service 16

TABLE OF AUTHORITIES.

Cases.

Broughton v. State, 199 S. E. 111 4

Cole v. Arkansas, 333 U. S. 196; 92 Law Ed. 644 ..... 4, 15

DeJonge v. State of Oregon, 299 U. S. 353; 57 S. Ct. 255 ..... 4, 15

Hamilton, Mary, v. State of Alabama, Supreme Court Reporter Advance Sheet, April 15, 1964, p. 982 ..... 3, 14

Johnson v. State of Virginia, 373 U. S. 61; 83 S. Ct. 1053 ..... 3, 14

Schware v. Board of Bar Examiners of the State of New Mexico, 353 U. S. 232; 77 S. Ct. Rep. 752 ..... 3, 14

Thompson v. City of Louisville, 362 U. S. 199; 80 S. Ct. 624 ..... 3, 14

Constitution.

Constitution of the United States:

Sixth Amendment 14

Fourteenth Amendment, Section 1 ..... 3, 5, 14, 15

Statutes.

Tennessee Code Annotated:

Sec. 39-4226 ..... 3, 5, 6, 13, 14, 47a

Sec. 39-4237 14

Sec. 40-2516 5

Sec. 47-964 5

Sec. 47-1002 5

Sec. 47-1020 ..... 3, 5, 6, 12, 13, 14, 48a

28 U. S. C. 1257(3) 2

INDEX TO PETITIONER'S APPENDIX.

(Printed under separate cover.)

Indictment 1a

Witnesses:

- Winfield Baird 6a
- Scott N. Brown 30a
- Bernard J. Cassidy 11a
- Character Witnesses 46a
- William Dunstan 21a
- Ralph I. Reece 24a
- William T. Salter 4a
- Eloise Thomas 9a
- Donald E. Wilding 21a

Tennessee Code Annotated—Charge to Jury 47a

Judgment of Trial Court 50a

Motion for New Trial 51a

Judgment of Trial Court Overruling Motion for New Trial and Granting Appeal 52a, 53a

Assignments of Error in Supreme Court of Tennessee 54a

Opinion of Supreme Court of Tennessee 61a

Judgment of Supreme Court of Tennessee 67a

Petition to Rehear 68a

Opinion of Supreme Court on Petition to Rehear 71a

Judgment of Supreme Court on Petition to Rehear 72a

Order of Supreme Court Permitting Second Petition to Rehear 73a

Second Petition to Rehear 73a

Opinion of Supreme Court on Second Petition to Rehear 78a

Final Judgment of Supreme Court Filed April 30, 1964 ..... 81a

Order of Supreme Court Staying Judgment Until Petition for Certiorari Is Acted Upon by Supreme Court 81a

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STATE OF TENNESSEE,
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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

May it please the Court:

The petitioner, Scott N. Brown, prays for the issuance of writ of certiorari to the Supreme Court of the State of Tennessee sitting at Knoxville, affirming the judgment of the Second Division of the Criminal Court of Hamilton County, Tennessee, finding him guilty of fraudulent breach of trust and adjudging that he be confined in the State Penitentiary for three years and pay the costs of the cause.

CITATIONS TO OPINIONS BELOW.

The Trial Court did not write any opinion but judgment of that court is at 50a of the Appendix hereto, and judgment overruling defendant's motion for a new trial and granting an appeal to the Supreme Court of Tennessee is at 51a. The opinion of the Supreme Court of Tennessee has not been published but the opinion and judgment affirming the Trial Court and opinion and judgment overruling the first petition to rehear, and opinion and judgment overruling the second petition to rehear are at 61a-68a; 71a-72a; 78a-81a. The judgment of the Supreme Court of Tennessee staying the judgment of that court and the court below until this Honorable Court could act on this petition is at 81a.

JURISDICTION OF THIS COURT.

The opinion and judgment of the Supreme Court of Tennessee was filed and entered on January 8, 1964. A timely petition to rehear was filed and on March 5, 1964, the Supreme Court filed its opinion and judgment was entered on April 7, 1964; but on March 16, 1964, judgment was entered permitting the plaintiff in error, Scott N. Brown, to file a second petition to rehear and granting him until Monday March 23, 1964, in which to file said petition. Said petition was duly filed on March 23, 1964, and on April 8, 1964, the Supreme Court filed its opinion on the second petition to rehear and final judgment was entered on April 30, 1964. On the same date an order was made permitting plaintiff in error to file petition in the United States Supreme Court for a writ of certiorari (78a-82a). The Supreme Court of Tennessee is the highest appellate court in the State of Tennessee.

Jurisdiction of this Court is invoked under sub-section 3 of Section 1257, Title 28, United States Code Annotated.

QUESTIONS PRESENTED.

(1) Does the State of Tennessee in this cause deprive your petitioner of his liberty and property without due process of law by convicting him in the Criminal Court of Hamilton County, Tennessee, of the offense of fraudulent breach of trust, as charged in the indictment, and adjudging the costs against him (2a-3a), when there was no proof whatsoever to support the conviction of the defendant in the Trial Court, as shown by his motion for a directed verdict in his favor at the conclusion of the State's proof (27a-30a), and Ground II of his motion for a new trial, 51a, and Assignment I of his Assignments of Error in the Supreme Court (54a-58a), and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, as was held by the Supreme Court in the case of *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232; 77 S. Ct. Rep. 752; *Johnson v. State of Virginia*, 373 U. S. 61; 83 S. Ct. 1053; *Thompson v. City of Louisville*, 362 U. S. 199; 80 S. Ct. 624, and in the recent case of *Mary Hamilton v. State of Alabama*, Supreme Court Reporter Advance Sheet, April 15, 1964, p. 982?

(2) Does the State of Tennessee deprive your petitioner of his liberty and his property without due process of law by indicting him under Section 39-4226, Tennessee Code Annotated, charging him with fraudulent breach of trust (2a, 3a, 47a), and trying and convicting him under an entirely different setion, to-wit, Section 47-1020, Tennessee Code Annotated, which had no application to the facts in this cause and was intended by the Legislature of Tennessee to apply to automobile floor plans, merchandise manufacturing and other similar financing plans, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and denying to him the equal protection of the law, as was held by the Supreme

Court of the United States in the case of *DeJonge v. State of Oregon*, 299 U. S. 353; 57 S. Ct. 255, and also by the Supreme Court of the United States in the case of *Cole v. Arkansas*, 333 U. S. 196; 92 Law Ed. 644?

(3) Does the State of Tennessee deprive petitioner of his liberty and property without due process of law by convicting him in the Criminal Court of Hamilton County, Tennessee for the offense of fraudulent breach of trust, as charged in the indictment, and adjudging the costs against him, when he plead "Not Guilty" to the indictment and was tried and the indictment was not given to the jury, as set out in Ground 7 (51a) of his motion for a new trial and Ground III of his assignments of error in the Supreme Court of Tennessee, which was affirmed by the Supreme Court, as was also the conviction in the two preceding questions, and does this violate Section 1 of Amendment 14 to the Constitution of the United States and deny to him the equal protection of the laws, as illustrated by the holding of the Supreme Court of Georgia in the case of *Broughton v. State*, 199 S. E. 111; where the Supreme Court held:

> "We believe it to be an accepted and established custom, in the trial of criminal cases in this State, to send the indictment out with the jury when they enter upon their deliberations, a practice, hoary with age, acquiesced in for a time whereof the memory of man runneth not to the contrary must be the law"?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provision involved is that part of Section 1 of the 14th Amendment to the Federal Constitution which reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

and Amendment 6, which recites the rights of the accused:

> "In all criminal prosecutions the accused shall enjoy the right * * *, and to be informed of the nature and cause of the accusation * * *."

TENNESSEE CODE SECTIONS INVOLVED.

Section 40-2516, relating to the Court's charge in felony cases:

> "Every word of the charge shall be written, as read from the writing, which shall be filed with the papers, and the jury shall take it out with them upon their retirement."

Section 39-4226 (47a-48a).

Section 47-1020 (48a-49a).

Section 47-964—Definitions.

"Goods" means chattels or merchandise in storage, which has been or is about to be stored.

Section 47-1002—Definitions.

"Document" means any document of title of goods.

"Goods" means any chattels, personal other than money, things in action, or things so affixed to land as to become a part thereof.

STATEMENT OF THE CASE.

The petitioner, Scott M. Brown, was indicted under Section 39-4226, Tennessee Code Annotated (47a-48a) (see also statement of Assistant Attorney-General, 47a-48a), in the Criminal Court of Hamilton County, Tennessee, on November 13, 1962, charging that on February 19, 1962, he did unlawfully, feloniously and fraudulently appropriate to his own use $13,400.00, the personal property of Chase Manhattan Bank and set out how it was done (2a, 3a). He was tried and convicted and sentenced to three years in the State Penitentiary (50a-51a, 51a-52a), and within the time allowed filed his motion for a new trial, (50a-51a, 51a-52a), which motion was overruled by the Trial Court on May 27, 1963, and the defendant was granted an appeal to the State Supreme Court and given sixty days in which to file his bill of exceptions and have it made a part of the record, which was done (52a-53a).

There were a total of seven indictments returned against the defendant, charging him with six additional offenses exactly like the case tried herein except as to dates, names and amounts (53a). The record herein does not show it, but petitioner here has since been tried on another one of these similar indictments and acquitted by the jury. The State, through the Attorney-General, moved to quash the other five indictments, which motion was sustained by the Trial Court and five additional indictments were returned by the Grand Jury against the defendant, under Section 47-1020, Tennessee Code Annotated (48a-49a), as we understand.

After petitioner's motion for a new trial was overruled he perfected an appeal to the Supreme Court of Tennessee, assigning errors, and the cause was duly heard and the judgment of the Trial Court was affirmed and

judgment of the Tennessee Supreme Court became final on April 30, 1964.

There were seven prosecuting witnesses—William T. Salter beginning at 4a; Winfield Baird at 6a; Eloise Thomas, 9a; Bernard J. Cassidy at 10a; Donald E. Wilding, 21a; William Dunstan, 21a and Ralph I. Reece, 23a. The testimony of Mr. Salter and Mr. Wilding is undisputed. None of the witnesses testified that the defendant, Scott N. Brown, got any of the money from the proceeds of the Salter note to the Commonwealth Life Insurance Company. It was undisputed that William T. Salter and wife, Margaret Jean Salter, on December 20, 1961, executed a deed of trust note to First Trust Company for $14,000.00, payable monthly, secured by deed of trust on their home in Cleveland, Tennessee, and this is filed as State's Exhibit 3. It is also undisputed that this note was never endorsed by First Trust Company, and that on February 13, 1962, it was endorsed to the Commonwealth Life Insurance Company as follows:

> "Without recourse on the undersigned, pay to the order of Commonwealth Life Insurance Company, this 13 day of February, 1962.
>
> First Trust Company,
>
> By: Scott Brown, *President.*"

and it is undisputed that this loan came from funds of First Trust Company and that on December 29, 1961, the mortgage was entered on the books as being receivable from Salter; and on January 2, 1962, a check for $12,900.64 was issued by First Trust to Phillips Real Estate Company, the agent of the Salters. (R. 232.) It is undisputed that Commonwealth Life Insurance Company of Louisville, Kentucky, on February 16, 1962, issued its check to First Trust Company for $27,292.38, which in-

cluded $13,453.99, the proceeds of the Salter note, as shown by State's Exhibit 16.

It is undisputed that State's witness, Winfield Baird, was the investment trust officer of Pioneer Bank and that he had occasion to handle mortgages for First Trust Company and handled the Salter mortgage, and he testified: "That this was actually a package of papers which came with the mortgage and supporting documents," and that he checked it over and actually made a deposit of $13,400.00 on January 29, 1962, to the credit of First Trust Company in the Pioneer Bank, as shown by State's Exhibit 8, and that on the same date, January 29, 1962, he mailed to Chase Manhattan Bank, State's Exhibit 7, request for that bank to credit the Pioneer Bank's account with $13,400.00 and that the stamp on this request, showing maturity date as July 31, 1962, was entered by Chase Manhattan Bank in New York. He also identified another deposit slip of the Pioneer Bank, dated February 17, 1962, State's Exhibit 9, showing a deposit of $45,152.47 to the credit of First Trust Company. He also testified that Chase gave Pioneer credit for the amount of the mortgage; that no check ever changed hands and the documents were kept in the Pioneer Bank, and that Pioneer had given First Trust credit for the instrument in Pioneer's money and charged it to Chase. Then Mr. Baird was asked:

> "After checking the documents, you gave First Trust $13,400.00; now that wasn't credit, that was money, that was a check?"

Mr. Baird answered:

> "We make a debit to Chase Manhattan's account and a credit to First Trust's account, at that time."

Then the witness testified as follows:

> "Q. And this was a money transaction wherein the money came from Pioneer to First Trust?

A. For the benefit of Chase Manhattan Bank.

Q. Just answer my question, sir.

A. Yes, we did.

Q. You did?

A. Yes.

Q. So that $13,400 was money of Pioneer Bank and given to First Trust, correct?

A. In the sense you are talking of, yes, sir.

Q. In the sense I am talking, that is the way the transaction happened. And then you all took a notice and sent it up to Chase that you had given $13,400 as these mortgage papers of your money to First Trust and they credited your account with $13,400?

A. Yes, sir.

Q. So what actually happened was, not what this indictment says, that Chase Manhattan Bank advanced on January 31 to First Trust Company $13,400, it didn't happen that way, did it?

A. Not specifically as stated." (8a.)

The gist of the testimony of Mrs. Thomas was that she signed State's Exhibit 10, reciting by check-mark "ALL DOCUMENTS," which was in effect the Salter papers and that they came to First Trust Company in that way. It is undisputed that Chase Manhattan Bank credited the account of Pioneer Bank with the sum of $13,400.00. (9a.)

The witness Bernard J. Cassidy testified that on January 31, 1962, the Pioneer Bank's account in Chase Manhattan was credited with $13,400.00 and read into the record at 11a an application of First Trust for $13,400.00, which had this provision:

> "It is addressed to the Chase Manhattan Bank, Chase Manhattan Plaza, New York 15, New York, advance number 1973, amount $13,400. 'We hereby apply for an advance of $13,400. to be made under the loan agreement between us, dated May 5, 1951, and our general loan and collateral agreement on file with

you: said advance to be repaid on demand, with interest at the rate of five and three-quarters per cent per annum, until the principal sum shall be paid.' " (12a.)

Mr. Cassidy admitted that the stamp on State's Exhibit 7 "maturity date due 7-31-62," was placed there by Chase Manhattan Bank. Then Mr. Cassidy testified:

"In other words, what actually happened was that they already had the money by the time this came down there, First Trust?

Only if Pioneer advanced it, a reimbursement from Chase.

Pioneer's bookkeeper testified that the money was put out on January 29, it was two days later before your credit note even got down there to Pioneer, wasn't it?

Yes, sir." (20a.)

It is undisputed that Ralph I. Reece is a qualified public accountant and had examined the books of First Trust Company and associate companies about May 1962, for the Trustee in Bankruptcy and had knowledge of the transactions, and that the defendant, Scott Brown, had made his personal records available to him and to the court. Then Mr. Reece testified further:

"Q. All right, sir, and so you are not here to present any evidence at all that this $13,400.00, as charged in this particular indictment, was appropriated by Scott Brown to his own use?

A. No, sir, I am not.

Q. And you couldn't do it, could you?

A. Not that specific money, no, sir.

Q. This period of this indictment here appears to be February 12, 1962, until the bankruptcy?

A. There were as result of our investigation, we determined that little or no funds were withdrawn directly from First Trust Company by Mr. Brown dur-

ing this period you refer to. There may have been a minor item or two, of a nature of reimbursement expense.

Q. What do you mean by minor?

A. $2.00, $20.00, $50.00—I don't think specifically of any, but our investigation indicated that there were no cash withdrawals, as we referred to them; that any such cash transactions of Mr. Brown and First Trust Company were in the nature of reimbursable expenses of relatively nominal amounts." (25a, 26a.)

Witness further testified that some time from January 1, 1962, to the bankruptcy on April 4, 1962, there was money transferred from First Trust Company and that Scott Brown had withdrawn from the other companies a total amount in excess of the Salter money.

Thereupon the defendant made a motion for a directed verdict in his favor for want of any evidence of guilt, which was overruled by the Trial Court.

The defendant testified in his own behalf, and it is undisputed, that First Trust Company had made it possible for 7500 families to purchase homes in the Chattanooga area; had made loans totaling $125 million, and had paid in interest to various banks $2 million; that there were a total of 55 employees and officers in his company and 25 or 30 outside employees; that it commenced doing business with Chase Manhattan about 1951 and that Pioneer Bank became the depository for Chase Manhattan in 1952, and that all of their money was handled by Pioneer, just as the Salter advancement was made; that he set up the policies of First Trust Company; that he did not appropriate $13,400.00 or any other amount and had never stolen a cent from any one; that there was more than $500,000.00 in the escrow accounts that he could have taken had he desired. (R. 216-217.) Mr. Brown tes-

tified that he did not destroy any collateral; that under the agreement with Chase Manhattan he could have thrown the Salter mortgage in the waste basket.

It is undisputed in the record that Mr. Brown proved a good character. (30a-46a.)

It is not in the bill of exceptions but is undisputed, as shown by the affidavits of Henry V. Grady, Attorney for Scott Brown; R. D. Elam, foreman of the jury and Tillman Grant, Trial Judge, that the indictment was not passed with the charge and papers to the jury. This question was raised in motion for a new trial and by assignment of error in the Supreme Court of Tennessee, but the court overruled this assignment, holding that the defendant had waived this failure on the part of the trial court, but we think the court concedes that it is the law, but should have been raised before the jury reported a verdict of "Guilty." (58a-60a.) The question that there was no evidence to support a verdict of guilt was first raised in the Trial Court on motion of the defendant, at the close of the State's proof, for a directed verdict in his favor. This question was again raised on motion for a new trial, and again raised in the Supreme Court by the first assignment of error, and again raised in the first and second petitions to rehear. The question of the Trial Judge's error in including in his charge statutes, which of course included Section 47-1020, Tennessee Code Annotated, was first raised by the defendant in the Trial Court, in Section 8 of his motion for a new trial, and again raised in his Assignment of Error IV in the Supreme Court, and again raised in the Supreme Court on the first and second petitions to rehear.

The Supreme Court, in its opinion overruling the second petition to rehear, concedes that Section 47-1020, Tennessee Code Annotated, had no application by stating:

"One of the arguments made in this petition is to the effect that the trial court erred in reading Section 47-1020, T. C. A. to the jury. This question was acted on in the original opinion on page 8 thereof. This Section makes the failure of a Trustee under a trust receipt transaction to turn over to the entruster the goods, etc., or to pay the entruster the proceeds from the sale of said goods, a fraudulent breach of trust. We held that the reading of this Code Section to the jury did not affect the matter in the least, even though the Section was not applicable to the charges made out in the indictment. Since this is merely a reargument of a question heretofore considered. which we still think was not erroneous, this contention is overruled." (79a.)

The Supreme Court, in its original opinion, quotes from the defendant's citing an incident that occurred after the jury had been out for two hours, as follows:

"Foreman—'On page 2 it reads, "Upon the happening of some event as provided in the instrument creating the trust relationship, what does that instrument refer to?"

The Court—'Well, I might state this. That the Court would like to further enlighten you, but under the rules of the Court, cannot give you any further oral instructions. It is mandatory that the Court give you a written charge and that is what the Court has done. The Court cannot give you any further instructions.

Foreman—'One other question. One item introduces the item 16, withdrawn, that had the 60-day clause in it. Shall we consider that or reject it?

The Court—'Well, it's up to the jury to decide the case.'

Foreman—'Thanks'." (65a-66a.)

Unquestionably, the defendant was indicted under Section 39-4226 of the Tennessee Code and was tried and convicted under Section 47-1020 of the Code, in violation

of the decisions of the Supreme Court of the United States, above cited, and of his Constitutional rights under the Fourteenth Amendment, and under the 6th Amendment to the U. S. Constitution.

Section 39-4226 has served the purpose of fraudulent breach of trust for more than 100 years, it being originally enacted in Tennessee by the Acts of 1855-1856 and brought into the Code of 1858.

As we understand, the 1963 Legislature has repealed Section 47-1020, Tennessee Code Annotated, effective at midnight, June 30, 1964. New Section 39-4237.

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. We think unquestionably that this case comes within sub-section (a) of section 1, rule 19 of this Court, in that the Trial Court and the Supreme Court of Tennessee has decided a Federal question of substance and convicted the defendant of fraudulent breach of trust under Section 39-4226, Tennessee Code Annotated, when there is no proof to support such conviction, contrary to the decisions of this Court, particularly *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, 77 S. Ct. 752; *Johnson v. State of Virginia*, 373 U. S. 61, 83 S. Ct. 1053; *Thompson v. City of Louisville*, 362 U. S. 199, 80 S. Ct. 624; the recent case of *Mary Hamilton v. State of Alabama*, S. Ct. Reporter Advance Sheet, April 15, 1964, page 982, and many others.

2. The Trial Court and the Supreme Court of Tennessee have charged the defendant, under Section 39-4226 of the Code and tried him under Section 47-1020 of the Code, which has no application to notes and mortgages but applies to automobile floor plans and similar financing, in violation of the decisions of this Court in the case of *De*

Jonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255 and *Cole v. Arkansas,* 333 U. S. 196; 92 Law Ed. 644 and many others.

3. We believe the decision of the Trial Court and the Supreme Court of Tennessee, holding that Scott N. Brown has not been deprived of his liberty or property without due process of law, in violation of his rights under the 14th Amendment to the Constitution of the United States, is a decision of a Federal question, which has not been heretofore determined by this Court, insofar as we have been able to find and which we believe should be determined by this Court and a holding that the defendant's Constitutional rights have been violated.

CONCLUSION.

WHEREFORE, and for the reasons set forth in this petition, it is respectfully submitted that this petition for certiorari should be granted and the ruling and judgment of the Trial Court and the opinion and judgment of the Supreme Court of Tennessee affirming the Trial Court, and adjudging the costs against petitioner be reversed and petitioner granted a new trial.

Respectfully submitted,

JOHN S. WRINKLE,
1521 Hamilton National Bank Bldg.,
Chattanooga, Tennessee,
Attorney for Petitioner, Scott N. Brown.

Certificate of Service.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have this day mailed a copy of the foregoing petition to Thomas E. Fox, Assistant Attorney-General, Supreme Court Office Building, Nashville, Tennessee, attorney for the respondent, State of Tennessee, with sufficient postage to deliver said copy.

THIS ____ day of July, 1964.

JOHN S. WRINKLE.